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In the Supreme Court of the United States

OCTOBER TERM, 1955

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JOSEPH T. BUDD, JR., AND FLORENCE W. BUDD, CO-PARTNERS, DOING BUSINESS AS J. T. BUDD, JR., AND COMPANY

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

KING EDWARD TOBACCO COMPANY OF FLORIDA AND MAY TOBACCO COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above cases on April 15, 1955.

OPINIONS BELOW

The opinion of the District Court (RK 97, RB 212)[1] is reported at 114 F. Supp. 865. The opinion of the Court of Appeals (App. A, *infra*, pp. 33-41) is reported at 221 F. 2d 406.

JURISDICTION

The judgments of the Court of Appeals (App. A, *infra*, pp. 42-43) were entered on April 15, 1955. By order of Mr. Justice Black, dated July 8, 1955, the time for filing a petition for a writ of certiorari was extended to and including August 1, 1955 (App. A, *infra*, p. 43). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether off-the-farm employees of respondents' tobacco bulking plants—one of which (Budd) processes tobacco grown by numerous small farmers while the other two (King Edward and May) process only tobacco grown by the processor—are employed in "agriculture" within the meaning of Section 3(f) of the Fair Labor Standards Act, and are therefore exempted by Section 13(a)(6) from the minimum wage and overtime provisions of the Act.

2. Whether employees of tobacco bulking plants are engaged in any of the enumerated operations on "agricultural or horticultural commodities" within the terms of the exemption provided by Section 13(a)(10) of the Act.

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[1] "RB" references are to the record in *Budd* while "RK" references are to the record in *King Edward*.

3. Whether the regulation of the Administrator of the Wage and Hour Division, defining "area of production" pursuant to Section 13(a)(10) of the Act, is valid.

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*), and the pertinent administrative regulations 29 CFR, Ch. V, § 536.2, and administrative findings are set forth in Appendix B, *infra*, pp. 44-70.

STATEMENT

These actions were brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin respondents from violating the minimum wage and record keeping provisions of the Act. The employees involved work in tobacco bulking or processing plants operated by the three respondents in the town of Quincy, Florida (RB 1-2, 6, 212; RK , 6, 69), and respondents claim that these employees are exempted from the wage provisions of the Act.

1. Respondents' processing operations relate to U.S. Type 62 Sumatra tobacco which is a leaf tobacco grown and used exclusively for cigar wrappers (RB 71, 83; RK 14). Type 62 requires a special kind of cultivation and curing (RB 71-72, 100; RK 11-17). It is grown in fields completely enclosed and covered with cheesecloth shade. When each leaf of tobacco reaches a certain state of maturity it must immediately be

harvested through a process known as "priming." The lower leaves are picked first, perhaps two or three from each tobacco stalk. This picking is repeated as the tobacco matures until the operation has been repeated six or seven times. At each priming, the tobacco is immediately taken into a tobacco barn located on the farm, where it is strung on sticks and dried by means of heat. When the tobacco is almost completely dried, the drying process is interrupted and the tobacco is permitted to absorb moisture and again dried (RB 215-216). The drying process is repeated until the tobacco has reached a stage in the process of curing when it is ready for the bulking plant involved in this case (*ibid.*). All the tobacco goes through this drying and redrying treatment in the barns before it reaches the bulking plant. Although some fermentation begins at this stage, the treatment in the barns is essentially a simple drying operation during which the moisture content of the tobacco is decreased from between 85% and 80% to between 25% and 10%, a moisture content of 25% being required for best results in the subsequent bulking and fermentation process. (RK 15, 41, 44). As each priming reaches the appropriate stage, it must immediately be packed in boxes and taken from the farms to the bulking plant for further processing.

The bulking process, although in one sense a continuation of the preliminary curing which begins in the barn, is a much more complex pro-

cess requiring extensive industrial equipment and much more carefully controlled conditions. (RK 39-47). In the bulking-plant the tobacco is immediately placed in piles known as "bulks" consisting of and requiring from 3,500 to 4,500 pounds of tobacco; any lesser amount will not retain and generate sufficient heat for the sweating and fermentation process. During this operation the temperature within the bulks is closely watched each day, and at regular intervals of from six to eight days the bulk is turned or shaken out, that is, the tobacco on the outside is placed on the inside and that on the top is placed on the bottom until the tobacco is in a condition in which it may be worked. At this point, the tobacco is then separated, graded, kased (sprayed with water), and again placed in bulks where the fermentation and the turning of the bulk continues until such time as the tobacco is in condition to be baled (RB 72-73, 100).

Expert evidence in the record of the *King Edward* case reveals that the bulking process involves considerably more than simply drying out or removing moisture from the tobacco. The process is described as a "fermentation" or "aging" process which is "largely a process of slow combustion" (RK 42), involving carefully controlled regulation of heat and temperature conditions to insure "development of the desired odor and aroma and elimination of the rawness or harshness and in part the bitter taste which characterize

all freshly cured leaf. * * * It is quite important, therefore, that the fermentation be properly controlled * * * " (RK 39). In order to maintain proper temperature distribution throughout the bulking process it is necessary that the bulk be "torn down and rebuilt" and the contents "redistributed" several times, and additional water added. "After each rebuilding of the bulk temperature rises more slowly and fails to attain the previous maximum unless additional water has been added." (RK 45). This bulk reconstruction process must be repeated usually from three to five times before the fermentation is completed (*ibid.*). Substantial dry matter, as well as moisture, is lost during the fermentation process, sometimes more dry matter than moisture (RK 47). "There is an important loss of nicotine, commonly ranging from 15 to 25 per cent or more of the total originally present" (RK 47), and what starch or sugar content there may be in the tobacco is further reduced (RK 47-48). The bulking process "lasts 6 to 12 months or longer" (RK 44; RB 75, 86).

2. The tobacco bulking process requires a large amount of valuable and expensive equipment, including a steam heated plant equipped with humidifying sprays, bulking platforms, kasing machinery and sprays, thermometers and thermometer tubes, bulk covers, baling boxes and presses, wax paper, baling mats, packing, sorting and grading tables (RB 73, 100). These operations also require

workers with special knowledge and experience in the processing of tobacco. Such a bulking plant cannot be economically owned or operated by the ordinary small farmer growing less than 100 acres of this type tobacco a year (RB 61). Cultivation of less than 65 acres per year, moreover, will not yield an adequate bulk of each priming for the processing operations (RB 61-62). Of the approximately 300 farmers growing Type 62 tobacco, 80 percent grow less than 25 acres per year and the majority grow from 11/2 to 10 acres per year (RB 61, 212). There are only 11 bulking plant operators engaged in processing Type 62 tobacco and two of these are not growers at all (RK 98, 148). Only five, or 1.6 percent, of the 300 growers maintain bulking plants processing only tobacco grown by the processor (RB 213; RK 148). Thus, the overwhelming majority of farmers have their tobacco processed by others.

3. Respondent Budd Company grows no tobacco itself and confines its operations to processing the tobacco grown by 52 (the number for 1950) small farmers (on a total of 263 acres) under an individual contract pursuant to which each farmer "theoretically took over the packing house with all its equipment and the employees (approximately 108) of the Budd Company for the processing of his own tobacco and sold the tobacco, when processed, to the Budd Company" (RB 217). Budd established a system of bookkeeping whereby each farmer paid the actual cost of the processing of the tobacco grown by him and the Budd paid

the employees (*ibid.*). During 1950, all of the 333,889 pounds of tobacco grown by these 52 farmers which was processed by Budd was also purchased by Budd, which sold 231,209 pounds to the Budd Cigar Company; the remainder of the tobacco was sold in interstate commerce to various other persons or companies (*ibid.*). Respondent Joseph T. Budd, Jr., is president of the Budd Cigar Company and as such is active in the management of that corporation (RB 202, 204).

4. The other two plants involved in this litigation (those of respondents King Edward and May) process only tobacco produced on farms operated by the processor.[2] In addition to the plant involved in this litigation, respondent King Edward also operates two other bulking plants at which it processes substantial amounts of tobacco grown by others (RK 23). For 1951, King Edward bulked at its three plants approximately 595,901 pounds of tobacco, of which 354,967 was not grown on its farms but was purchased from other growers (RK 23-24).

Each farm and each bulking plant operated by King Edward is under the direct supervision of a superintendent who hires, fires, controls, and pays the employees (RK 24). Each bulking plant has its own separate payroll and production records

[2] King Edward, however, owns none of the farm lands, tenant houses, warehouses or land beneath the warehouse, all of which is owned by Jno. Swisher & Son, Inc., of which King Edward is an affiliate (RK 22, 23); such lands and building are leased to King Edward on an annual rental basis of approximately $120,000 (RK 23).

which are maintained by King Edward's main office employees from records forwarded by the various superintendents (RK 25). Different wage scales are maintained as between farm employees and plant employees (*ibid.*). The cost to King Edward, in 1950, for tobacco purchased from others was $744,262.39, whereas the farm cost for growing tobacco on its rented farms amounted to only $482,709.80 (RK 24). The bulking plant cost for the 1950 crop was $215,463.47, plus an "administrative cost" of $62,643.05 (*Ibid.*); the farm cost of $482,709.80 represented approximately 32 per cent of the total cost of $1,505,078.72 to King Edward for its operations on the 1950 crop (*ibid.*).

5. The Budd plant employs approximately 105 employees in bulking, sorting, grading and baling tobacco (RB 82, 90, 201, 204), while King Edward employs approximately 120 employees and May approximately 70 employees in the same operations (RK 2, 7, 12, 60, 69). The parties agree that none of the employees engaged in such operations were paid the minimum wage required by the Act (RB 201, 204; RK 81, 112); nor have the respondents maintained the records of wages, hours and other conditions of employment required by the Act (RB 230; RK 81, 113).

On cross-motions for summary judgment filed by the respective parties, the District Court entered decrees (RB 229-231; RK 136-138) enjoining respondents from violating the minimum wage and record keeping provisions of the Act. The District Court held that the Act's agriculture exemption

(App. B, *infra*, pp. 44, 45) ends when the tobacco reaches the receiving platform of the bulking plant, and rejected respondents' claims that their bulking plant employees are exempt from the Act under Sections 13(a)(10) and 13(a)(10) (App. B, *infra*, p. 45) (114 F. Supp. 865).

The Court of Appeals reversed, holding that the agricultural exemption applies to employees in the King Edward and May plants which process only tobacco grown by the processor, and that the Section 13(a)(10) exemption (App. B, *infra*, p. 45) applies to the processing plants of all three of the respondents when the operations are performed within the "area of production." The court recognized that one of the conditions of the Administrator's definition of "area of production" was not met by any of the processing plants, but it held that the definition was invalid insofar as it limits the area of production to "the open country or in a rural community" and excludes "any city, town or urban place of 2,500 or greater population." The court ruled that the Secretary of Labor was in no position to seek the remedy of injunction until a valid definition is made since respondents "might likely fall with[in] a valid definition."

REASONS FOR GRANTING THE WRITS

The decision below, in holding invalid the Administrator's regulation defining "area of production," conflicts squarely with the decision of the Court of Appeals for the Tenth Circuit in *Tobin* v. *Ivades Compress Company*, 199 F. 2d 8, certiorari denied, 344 U. S. 909, rehearing denied, 344 U. S.

631. Also, the construction below of the "agriculture" and the Section 13(a)(10) exemptions from the Fair Labor Standards Act as applicable to respondents' tobacco bulking plants is, we believe, inconsistent with this Court's recent decision in *Mabee* v. *Waialua Agricultural Company*, 340 U. S. 254. These conflicts and inconsistencies are of great importance, affecting the applicability of the Act's minimum wage provisions to large numbers of workers engaged not only in tobacco processing but in similar operations related to other agricultural products.

1. Section 13 (a) (10) (App. B., *infra*, p. 45) exempts from the minimum wage requirements "any individual employed within the area of production" (as defined by the Administrator), engaged in[2] specified activities on "agricultural or horticultural commodities". The regulation ruled invalid by the Fifth Circuit, and upheld by the Tenth Circuit,[3] was promulgated about two years after a previous definition of "area of production" had been overthrown in *Addison* v. *Holly Hill Co.*, 322 U. S. 607.[4] The defect of that definition was its inclusion of a limitation on the number of em-

[2] Section 7(c) (App. B., *infra*, pp. 44-45) also provides that in the case of an employer engaged "in the first processing within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations" the overtime provisions shall not apply "during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year."

[3] The regulation was issued December 18, 1946, and was effective March 1, 1947.

ployees that might be employed in the plant seeking exemption. The "redefinition" was issued after careful study of this Court's opinion in the *Holly Hill* case, after extensive investigation and conferences with various interested parties, and after public hearings conducted on behalf of the Administrator, at which testimony, recommendations, and representations were adduced by industry and employee representatives. In addition to the six formal hearings, numerous informal conferences were held throughout the country with representatives of labor and of the industries involved. Substantial economic data, including economic reports treating specific industries affected by the proposed definition, was assembled by the Department of Labor. After all these studies were completed, the Administrator published detailed findings indicating the major considerations entering into the promulgation of the redefinition and explaining the manner in which he sought to apply the principles enunciated in *Holly Hill*.—3 CCH Labor Law Reporter, par. 23,282 (App. B, *infra*, pp. 48-70).

The objective of the redefinition, as stated by the Administrator in his findings (*ibid.*), was to meet the requirement of *Holly Hill* that the definition be in terms of "area" or "geographic bounds," but also with recognition that the task involved "complicated economic factors" which "the Administrator may properly weigh and synthesize." 322 U. S. at 614-616. The redefinition omitted the objectionable limitation of the previous definition and prescribed that the place of employment must

be located (1) "in the open country or in a rural community" (which for "purposes of this regulation" "shall not include any city, town, or urban place of 2,500 or greater population") and (2) within a specified mileage distance from the source of 95 percent of its commodities. (App. B, *infra*, pp. 46-47).[*]

The *Traders Compress* decision, *supra*, sustained the "rural area" as well as the mileage distance tests of the regulation. It held that "the Administrator's definitive regulation is based upon relevant economic factors, that it does bear a reasonable relationship to the purposes of the exemption, and is therefore not arbitrary and capricious." Specifically on the "rural area" test, the court stated: "From an analysis of available data, the Administrator recognized that the size of a town is not a perfect criterion of its urban or industrial character, but it was adopted as the best available test, and leads to results generally accurate" (199 F. 2d at 11). "Having in mind that the primary object of the definition is to attempt to arrive at an economic balance between rural and industrial labor conditions . . . we cannot say that population of cities and towns is not a relevant economic factor in determining

[*] With respect to operations on tobacco the distance prescribed is 50 airline miles. Respondents' bulking plants concededly meet the mileage test but do not meet the "rural area" test inasmuch as they are located in a town with a population greater than 2,500. Quincy, Fla., has a population, according to the 1950 census, of 6,586 (RB 86).

whether labor conditions are predominantly rural or industrial." (*Ibid.*).

This Court denied the petition for certiorari. 344 U.S. 909. There was at that time no conflict among the courts of appeals, the *Traders Compress* decision being the first appellate decision on the question of the validity of the Administrator's redefinition of "area of production" subsequent to this Court's ruling in *Addison v. Holly Hill Co.*, 322 U.S. 607. The Government did not oppose the petition for certiorari in *Traders Compress*, despite the apparent correctness of the decision and the absence of any conflicting decisions, because of the importance of the issue.

There is now a direct conflict between the Tenth and Fifth Circuits. In addition to the decision below, the Fifth Circuit has explicitly disagreed with and declined to follow the *Traders Compress* decision in two other cases involving operations identical to those involved in *Traders Compress*. See *Jenkins v. Durkin*, 208 F. 2d 941, and *Lovvorn v. Miller*, 215 F. 2d 601.[2] The instant case is indistinguishable from *Traders Compress* except

[2] In the *Jenkins* case, the employer's establishment met neither the mileage distance condition nor the rural area condition. Since the court upheld the validity of the mileage distance condition, it ruled that the exemption was inapplicable even though the rural area condition was invalid. No petition for certiorari was filed by the Government because the judgment in favor of the Secretary was affirmed by the Court of Appeals. The *Lovvorn* case was a suit between private litigants, to which the Government was not a party and therefore in no position to seek certiorari.

for the fact that processing operations on tobacco, rather than on cotton, are involved. That this difference is immaterial is evident from the fact that the decision below on this issue simply reaffirmed the two previous rulings of the Fifth Circuit in cases which did involve cotton operations.

As this Court observed in *Holly Hill*, the question of the validity of the definition of "area of production" is "a much litigated question of importance in the administration of the Fair Labor Standards Act." *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 609. The definition limits two exemptions provided in the Act for operations on agricultural or horticultural commodities, Sections 7 (c) and 13(a)(10) (see *supra*, p. 11), and, consequently, determines applicability of the Act to a large number of employees employed in a wide variety of activities. Several years of delay in enforcement of the Act with respect to such activities resulted from the invalidity of the Administrator's previous definition. Unless and until the validity of the new regulation is settled by this Court, numerous workers employed in many types of industrial or quasi-industrial processing within the Fifth Circuit will be denied the minimum wage and overtime benefits of the Act. Moreover, employers within the Fifth Circuit will enjoy a substantial competitive advantage over those located in the adjoining Tenth Circuit.

2. The decision below is not only in conflict with that of the Tenth Circuit; it is also incorrect in

ruling that the Administrator's new definition of "area of production" is invalid.

While holding that Congress intended the definition to be drawn in terms of "area" and "territorial bounds," this Court explicitly recognized in *Holly Hill* that the Administrator's task was not a simple map-making task, but involved "complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and more or less near their production." 322 U.S. at 613-614. The decision expressly recognized that there is a "choice of areas open to [the Administrator]" depending upon consideration of these economic factors (*id.* at 619), and he "may properly weigh and synthesize all such [economic] factors" (*id.* at 614); "Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter" (*id.* at 614). As stated in the majority opinion in *Traders Compress*, "from the *Addison* [*Holly Hill*] case, we are clear that 'area of production' cannot be measured or delineated by the mere fact of production alone. If the task had been deemed that simple, Congress could have easily provided its own definition without resort to administrative implementation" (199 F. 2d at 10).

On the basis of a careful and exhaustive survey (*supra*, p. 12), the Administrator adopted two basic criteria, both formulated in terms of geographic area but at the same time taking into ac-

count the complicated economic factors which, as this Court recognized, Congress intended to be considered. The first of these criteria, the mileage test (*supra*, p. 13), is admittedly met by all three respondents here and is not at issue in this case.[6] The second criterion—that the employment be within a rural area (*supra*, p. 13)—was based upon the plain Congressional intent to distinguish "between rural communities and the urban centers" (App. B, *infra*, p. 49; see 322 U.S. at 615). This problem was approached directly by drawing the bounds of the area of production so as to exclude, insofar as was feasible in a definition of general application, the centers of industrial production without excluding the area of agricultural production. The Administrator's findings state: "An analysis of all the available data indicated * * * that while the size of a town is not a perfect criterion of its urban or industrial character, it is nevertheless the best available test, and leads to results which in general are accurate enough to warrant its adoption" (App. B, *infra*, pp. 56-57). The results reached by other Government agencies having long experience in distinguishing between rural and urban areas were heavily relied upon in

[6] This question presents no conflict since the only two Courts of Appeals who have decided the question, the Fifth and Tenth, have upheld the validity of this test. In addition to *Traders Compress*, in which both the "mileage" and "rural area" tests were held valid by the Tenth Circuit, see *Jenkins v. Durkin*, 208 F. 2d 941 (C.A. 5). A similar test was also held valid by the Fifth Circuit prior to the *Holly Hill* decision. See *Fleming v. Farmers Peanut Co.*, 128 F. 2d 404.

choosing the 2,500 figure (App. B, *infra*, p. 58). As the industrial areas of cities were found generally to extend at least short distances beyond their political boundaries, a mileage tolerance for this test was found necessary to avoid discrimination not based on substantial economic differences (App. B, *infra*, pp. 59-60).

Although this Court expressly declined to comment on the validity of the "rural area" (sometimes referred to as "population") test in *Holly Hill*, because the establishment there involved met this test, 322 U. S. at 610, it is an indisputable fact that agricultural production of any significance is usually carried on in rural areas and not in urban centers. This is one of the "economic factors" which the Administrator could scarcely ignore. Even under the view of the court below, that the Administrator is restricted to defining the geographic bounds of the land area within which the particular commodity is actually produced, it would be difficult to find fault with that part of the definition which merely excludes the centers of urban life. This aspect of the definition accords with the legislative history, which, as this Court noted in *Holly Hill*, shows that Congressman Biermann, who sponsored the statutory provision in question, indicated "plainly enough" that he had in mind differences between establishments in "rural communities and urban centers." 322 U. S. at 615. Certainly the 2,500 "population" or "rural area" test cannot be regarded as arbitrary or unrelated

to the factors the Administrator was directed to consider or the ends he was to attain.

If there were any doubt of the validity of the Administrator's redefinition, it has been eliminated, we submit, by Congressional approval subsequent to its issuance. Congress has repeatedly been advised of the redefinition and of the criticisms of it, and has on several occasions declined to enact specific proposals to revise the regulation and the statutory provision under which it was issued. Not only have interested employers criticized the definition and proposed specific amendments to Congressional committees,[7] but the Administrator and the Secretary of Labor on numerous occasions have recommended revision of Section 13(a)(10) in order to alleviate certain recognized competitive inequities and administrative difficulties inherent in any valid definition of "area of production." This recommendation has been repeated on numerous occasions by the Administrator and the Secretary of Labor, both through annual reports to Congress,[8]

[7] The attorney who represented the Traders Compress Company appeared before both the Senate and House Committees and made the same arguments against the Administrator's definition, including a direct attack upon the "rural area" test that he later advanced before the Tenth Circuit in *Traders Compress*. See Hearings before a Subcommittee of the Committee on Labor and Public Welfare on S. 558, S. 67, S. 92, S. 195, S. 150, S. 248, and S. 653, 81st Cong., 1st Sess. (1949), pp. 658-705; and Hearings before the Committee on Education and Labor on H. R. 2033, 81st Cong., 1st Sess. (1949), Vol. 4, pp. 872-887, 912-915.

[8] Illustrative are the 1948 Annual Report of the Wage and Hour and Public Contracts Divisions, pp. 123-134, and the 1950 Annual Report of the Secretary of Labor, pp. 281-285.

and in appearances before Congressional committees considering the subject.[9] The aftermath of the testimony and recommendations before the Congressional committees considering the 1949 amendments to the Act was a recommendation by the Senate Committeee for repeal of the exemption altogether. The bill as passed by the Senate, however, retained the exemption in its original form (95 Cong. Rec. 12435-12436). Although the House bill would have amended the exemption to transfer authority to define "area of production" from the Administrator to the Secretary of Agriculture, this was abandoned in conference and the bill, as enacted, left the "area of production" provision unchanged (95 Cong. Rec. 14933).

Indeed, Congress has had actual knowledge of the redefinition practically since it was issued. In February 1947, the redefinition and the Administrator's findings were both called to the attention of a House subcommittee considering the Portal-to-Portal Act of 1947.[10] A number of witnesses appearing before this subcommittee testified that the "rural area" test of the redefinition would remove from the "area of production" many employers who would be within it under the definition invalidated in *Holly Hill*. Undoubtedly, it was this testi-

[9] For example, see the testimony of the Administrator before the House Committee considering the 1949 Amendments to the Act. Hearings before the Committee on Education and Labor on H. R. 2033, 81st Cong., 1st Sess. (1949), p. 56.

[10] See Hearings Before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, 80th Cong., 1st Sess., on H. R. 584 and H. J. Res. 91, pp. 210-221.

mony that led to the enactment of Section 12 of the Portal-to-Portal Act of 1947 (29 U.S.C. 251, 261) which specifically referred to the redefinition in providing exemption from liability that might have been incurred through its retroactive operation.

Not only did Congress thus decline to modify the Administrator's regulation or revise the statutory language, but it affirmatively approved existing administrative regulations by providing in Section 16 (c) of the Fair Labor Standards Amendments of 1949 that "any order, regulation, or interpretation of the Administrator of the Wage and Hour Division * * * in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect * * * except to the extent that any such order, regulation [etc.] * * * may be inconsistent with the provisions of this Act * * *." This legislative action was taken, as we have indicated, in the face of repeated petitions for revision of the "area of production" requirements by both interested employers and the officials charged with enforcement of the Act. It would seem to follow, *a fortiori* from this Court's decisions, that Congress has confirmed and ratified the Administrator's regulation redefining "area of production." See *Alstate Construction Co.* v. *Durkin*, 345 U. S. 13, 16-17; *Mancari* v. *Wailing Agricultural Co.*, 349 U. S. 254, 270.

3. The additional ruling below that the hulking plant employees of respondents King Edward and May are exempt as engaged in "agriculture" is inconsistent with this Court's recent decision in

Maneja v. Waialua Agricultural Company, 349 U. S. 254.

The Fifth Circuit's opinion, which was rendered prior to this Court's decision in *Waialua*, relies solely on two factors which, under the *Waialua* decision, plainly do not determine the applicability of the agriculture exemption. These two factors are (1) that King Edward and May, at the plants in question, processed tobacco leaf "grown exclusively on their farms," and (2) that the bulking process is "essential for the marketing" of this type of tobacco. Both of these factors were at least equally present in *Waialua*. The agriculture exemption was held inapplicable to Waialua's sugar processing plant despite the fact that Waialua, like the plants of King Edward and May, processed only its own grown agricultural commodity, and despite the fact that the commodity (unmilled sugar cane) is "unmarketable as such" and "must be processed within a few days of harvesting or serious spoilage will result" (349 U.S. at 257, 265).

On the other hand, the factors—ignored by the court below—which this Court held in *Waialua* to be most pertinent and significant are equally, if not more, determinative in the instant cases. One of the factors especially emphasized by this Court is "what is ordinarily done by farmers with regard to this type of operation," the pertinent consideration being "not the proportion of millers who grow their own cane but the percentage of farmers who engage in milling" (349 U.S. at 265, 267). The undisputed facts in the present records show that

tobacco farmers do not ordinarily perform the bulking operation. Of the approximately 300 farmers who grow Type 62 tobacco in Florida, only 9 maintain and operate their own bulking plants (See Statement, *supra*, p. 7). The remaining farmers have their crop processed by others. Thus, Budd, which is an independently operated plant, processed tobacco grown by 52 small farmers (RB 217). And King Edward purchased from other farmers almost 60% of the total poundage bulked at its plants during 1951; the cost of the crop purchased from others represented about 68 percent of its total cost for the 1950 crop processed at its three plants (RK 23-24). *See supra*, pp. 7-9.

Other factors which the *Waialua* decision emphasized as of particular significance were the "quasi-industrial" nature of the operation during the course of which the commodity "is changed from 'its raw or natural state,'" and the "the omission * * * [of the operation] from the exemption provided by Section 13(a)(10) for various processing operations performed within the area of production." 349 U.S. at 267, 268. The instant cases are indistinguishable from *Waialua* in these respects, also. As shown *infra*, pp. 24-29, the court below erroneously assumed that the tobacco bulking operation is included in Section 13(a)(10), and its reasoning that the extension of the agriculture exemption to the King Edward and May plants would not result in discrimination against the small farmer rests upon this erroneous construction of Section 13(a)(10). Indeed, even on

the court's reading of Section 13(a)(10), the effect of its holding, far from equalizing the status of large and small farmers (cf. *Wirtz* decision, 349 U.S. at 268), is to give large growers like King, Edward and May a decided advantage over the small farmer. For under the Fifth Circuit's view of the "agricultural" exemption the King Edward and May plants are wholly exempt from both minimum wage and overtime requirements of the Act, whereas, if the Administrator's definition of "area of production" is valid, as we believe is the case (*supra*, pp. 15-21), the Budd plant has no exemption (even if it be assumed that Section 13(a)(10) applies to the tobacco bulking operation).

4. As just mentioned, the decision below is also incorrect in holding that the bulking of tobacco is within the scope of the operations enumerated in Section 13(a)(10). (App., B., *infra*, p. 45). This section does not exempt every operation which in a broad sense may be necessary for marketing agricultural products. On the contrary, the exemption is limited to individuals engaged only in the specifically enumerated operations on "agricultural or horticultural commodities." Tobacco bulking is not only *not* one of the specifically enumerated operations but bulked tobacco is not an "agricultural or horticultural" commodity in the way that term is used in Section 13(a)(10).

(a). The tobacco bulking process is not specifically enumerated as are "ginning," "pasteurizing," "compressing" and "canning," which are

forms of quasi-industrial processing that may change the natural state of the commodity in a way that might be analogous to tobacco bulking. "Drying" is also specifically enumerated, but that term, by any recognized definition, is limited to simple dehydration or removal of moisture. Plainly, the term does not include anything so complex as bulking, which indeed involves more addition than it does removal of moisture.[1] The most comprehensive term enumerated in the section is "preparing" and it is expressly limited to "preparing in their raw and natural state." From the legislative history it is clear that this term contemplates only such simple operations as washing the raw commodity, not "processing" the commodity into an industrial product. See colloquy among Senators Barkley, Schwellenbach, and Black, 81 Cong. Rec. 7877-7878.

It seems equally apparent that the other general terms, "handling," "packing" or "storing," refer also to simple non-processing operations, such as loading and unloading commodities or weighing or moving them from one place to another, placing them in containers or in storage rooms, and preparing activities which do not substantially change the raw or natural state of the

[1] Contrary to the contention made by respondents, bulking is not a simple "drying" operation. Most of the moisture has been removed in the preliminary drying process in the barns on the farm before the tobacco reaches the bulking plant (RK II 51, RB 246). The drying operation which takes place in the barns reduces the content from between 80 and 85

commodities. The tobacco bulking process is considerably more complex and substantial. Like sugar milling, it is more of an "industrial" or "manufacturing operation" in the course of which the tobacco is very substantially "changed from its 'raw or natural state'" into an industrial product and is, therefore, no longer an "agricultural or horticultural" commodity within the meaning of Section 13(a)(10). See *Waialua* opinion, 349 U.S. at 265, 268. Whether or not the term "raw or natural state" grammatically modifies all of the preceding operations in Section 13(a)(10), as the courts have held,[12] the context in which the phrase "agricultural or horticultural commodities" is used, as well as the relationship of this exemption to other exemptions for processing of such commodities (notably Section 7(c)), demonstrate that the "handling," "packing," "storing," and "preparing" operations must all relate to a commodity not yet subjected to industrial processing.

As this Court recognized in the *Waialua* case (349 U.S. 254), and as the Courts of Appeals have long held, the various exemptions for operations related to "agriculture" "are in *pari materia* and must be construed together to form a consist-

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percent to between 25 and 10 percent, which is about the same moisture content of the tobacco when the bulking process is completed. *Ibid.* This, while the operation in the barns is essentially a drying operation, the bulking process requires much more carefully conditioned and prolonged treatment with the use of the extensive industrial equipment (see Statement, *supra*, pp. 3-7).

[12] See *Puerto Rico Tobacco Marketing Coop. Ass'n* v. *McComb*, 181 F. 2d 697, 701 (C.A. 1); *Wyatt* v. *Holtville Alfalfa Mills*, 106 F. Supp. 624, 631 (S.D. Cal.).

ent whole, if possible" (*Bowie* v. *Gonzalez*, 117 F. 2d 11, 17 (C.A. 5)). Also, see *Stratton* v. *Farmers Produce Co.*, 134 F. 2d 825 (C.A. 8)). Section 7(c), which together with Section 13(a)(10) establishes an integrated pattern of exemption for activities closely related to agriculture, provides a 14 work-week exemption from the overtime provisions of the Act for "the *first processing*, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations." [Emphasis added] (App. B, *infra*, pp. 44-45). Section 13(a)(10), on the other hand, grants a *complete wage and hour* exemption to "any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing * * * drying, preparing in their raw or natural state * * * agricultural or horticultural commodities for market." Since both sections apply to "agricultural or horticultural commodities" and both are restricted to employees employed within the "area of production (as defined by the Administrator)," the significant difference in language lies in the term "first processing" in Section 7(c).

It seems plain that the general terms "handling," etc., used in Section 13(a)(10) do not include any operations which properly may be classified as "first processing." Otherwise, the limited exemption in Section 7(c) becomes meaningless in view of the complete exemption in Section 13(a)(10). See *Bowie* v. *Gonzalez*, *supra*, 117 F. 2d at 18-19. Bulking would constitute "first processing" under

Section 7(c) rather than any of the operations listed in Section 13(a)(10). It is important that this construction of two exemption provisions be adopted, for, if the general terms in Section 13(a)(10) are broadly construed to include industrial processes which substantially change the natural form of agricultural commodities, the minimum wage benefits of the Act will be denied to large numbers of workers, not only in tobacco processing plants, but also in a wide variety of other industrial plants processing agricultural commodities.

(b). The Administrator's interpretation that the tobacco bulking process is not included in Sections 13(a)(10), like the Administrator's regulation defining "area of production" (see *supra*, pp. 19-21), has been ratified by subsequent legislative developments. The interpretation was repeatedly stated and published long before the enactment of the 1949 Amendments to the Act, and was clarified beyond doubt at the time of the issuance of the regulation amending "Area of Production As Used in Section 7(c) of the Fair Labor Standards Act" on November 18, 1948 (13 F.R. 7347). That regulation stated specifically with reference to the tobacco bulking process:

> The amendments * * * are intended, among other things, to make it clear that in Puerto Rico, as elsewhere, *bulking of leaf tobacco, which characteristically involves processing operations not mentioned in section 13(a)(10)* of the Fair Labor Standards Act, *will not pro-*

cide a basis for exemption under that section. * * * [Emphasis added.] [3 CCH Labor Law Reporter (4th ed.), par. 23, 281.]

This clear administrative construction of the exemption was outstanding at the time of the enactment of the Fair Labor Standards Amendment of 1949 (October 26, 1949) and is, therefore, within the scope of Section 16(c) of that Act which explicitly kept "in effect" outstanding interpretations of the Administrator or the Secretary, not inconsistent with those amendments. See *supra*, p. 21.

CONCLUSION

It is respectfully submitted that this petition for writs of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

STUART ROTHMAN,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
JAMES R. BILLINGSLEY,
Attorney,
United States Department of Labor.

JULY 1955.

APPENDIX A

Opinion of the Court of Appeals

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15016

JOSEPH T. BUDD, JR. AND FLORENCE W. BUDD, CO-PARTNERS, DOING BUSINESS AS J. T. BUDD, JR. AND COMPANY, APPELLANTS

versus

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLEE

and

No. 15071

KING EDWARD TOBACCO COMPANY OF FLORIDA AND MAY TOBACCO COMPANY, INTERVENOR, APPELLANTS

versus

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLEE

Appeals from the United States District Court for the Northern District of Florida

(April 15, 1955)

Before HUTCHESON, Chief Judge, and RIVES and TUTTLE, Circuit Judges.

RIVES, Circuit Judge: The opinion of the district Court in these cases is reported at 114 F. Supp. 805. The Budd case was the action first brought by the Secretary of Labor under Section 17 of the Fair Labor

Standards Act[1] to enjoin the Budds from violating the minimum wage and record keeping provisions of the Act. At the conclusions of a pre-trial conference on that case, the district court was of the opinion that the Budd company operation was in violation of the Act, but, in order to avoid putting the small farmers, whose tobacco was processed by the Budds, at an economic disadvantage to the operators who processed their own tobacco exclusively, the court insisted that before decision in the Budd case, the issues be broadened to include such large operations. Accordingly, suit was brought against the King Edward Company and the May Company intervened.

The cases involve the definition of "Aggiculture" under Title 29 U.S.C.A. Section 203(f),[2] the agricultural exemptions under Section 213(a), clauses 6 and 10,[3]

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[1] Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U.S.C.A. 201, et seq., as amended by the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910.

[2] "(f) 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

[3] "§ 213. *Exemptions*

"(a) The provisions of sections 206 and 207 of this title shall not apply with respect to . . . . . (6) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a share-crop basis, and which are used exclusively for supply and storing of water for agricultural purposes. . . . .

and, incidentally the exemption from the maximum hours provision under Section 207(c)."

All of appellant's processing operations are in connection with U.S. Type 62 Sumatra tobacco, which is a leaf tobacco grown and used entirely for cigar wrappers. This type of tobacco is grown exclusively in three counties in North Florida, and two counties in South Georgia contiguous to two of said Florida counties. Most of such tobacco is grown within an airline radius of thirty miles of Quincy, the County Seat of Gadsden County, Florida.

We quote from the opinion of the district court:

"Method of Growing, Harvesting and Marketing Type 62 Shade-Leaf Tobacco

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(16) any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products. * * * * * * * *"

"§ 207. Maximum hours"

"(c) In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) of this title shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a) of this title, during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged."

"Type 62 shade leaf tobacco requires special and pain-taking cultivation, harvesting, curing and preparation for market. It grows in fields inclosed in a cheesecloth shade, which completely covers and incloses the tobacco field. The cheesecloth is supported by wires strung on posts placed at regular intervals through the fields. It is highly fertilized and intensively cultivated during the growing period. When each leaf reaches a certain stage of maturity it is promptly harvested. This harvesting process is known as 'priming'. The lower leaves are picked first, perhaps not more than two or three from each stalk. This picking is repeated as the tobacco matures on up the stalk until all the marketable leaves have been removed. At each priming the tobacco is immediately taken to a tobacco barn located on the farm where it is strung on sticks and dried by means of heat. When the tobacco is almost completely dried the drying process is interrupted and it is permitted to absorb moisture and again dried. This drying process is repeated until the tobacco has reached a stage in the process of curing when it is ready for the packing house.

"It is then taken from the barns in the field, placed in appropriate containers and carried to the packing house where it is placed in piles known as 'bulks' for curing. Each bulk consists of more than 3000 lbs. of tobacco. The packing houses are equipped with machinery for the appropriate humidification and curing of the tobacco. During the curing period the temperature within each bulk is closely watched from day to day and at regular intervals, when the appropriate time has arrived, the bulk is broken up, the tobacco leaves shaken out and those on the outside placed on the inside of the new bulk and those on the inside placed on

the outside for further curing. This process is continued until the tobacco is ready for market when it is bailed (sic) for shipment." Durkin v. Budd, 114 F. Supp. 865, 866-867.

After such processing, this type tobacco falls into eight main classifications, and none of those classifications can be determined prior to the processing. Primarily, because it cannot be graded until it has been processed, there is no market at an earlier stage for this type tobacco. The market variation dependent upon grading is considerable, ranging from a high of approximately $2.40 per pound down to as low as $.40 per pound.

Some 300 farmers in the Quincy area grow this type of tobacco with about 80% growing and harvesting less than 25 acres per year, and a majority producing only 1½ to 10 acres per year. As has been noted, the natural heating, fermentation, and curing of this tobacco requires bulks of more than 3000 lbs. of tobacco. The small farmers do not grow the tobacco in such quantities, and, hence, cannot process their own tobacco. For the year 1950, some 52 of such small farmers cultivating a total of 263 acres had their tobacco processed by the Budd Company. That company grows no tobacco of its own but processes tobacco grown by others.

During 1950, the King Edward Tobacco Company cultivated 206 acres, and the May Company 90 acres of this type tobacco, and those two companies processed their own tobacco, and did not handle the tobacco of any other person at the packing houses here involved. Those packing houses are located in the town of Quincy, which, according to the 1950 census had a population of 6,586, and the Budds' packing house is also in that town. At the height of the packing season, May employs approximately 70 employees in its packing plant, King Edward some 420 employees, and Budd

approximately 108 employees. The majority of all such employees work also on the farms when not engaged in work at the packing plants. Other pertinent facts appear in the opinion of the district court.

King Edward and May claim that their employees are exempt from the provisions of the Act under Section 213(a)(6) because they are employed in agriculture.[5] As to King Edward and May, the appellee concedes that:

> "Appellants are admittedly 'farmers' in their growing operations, and admittedly the mere fact that they are large growers does not affect the availability of the exemption to them insofar as they are in fact farmers. But obviously appellants are also something else in addition to being growers—they are also operating separate and extensive commercial enterprises, of the same character as similar independently owned and operated packing houses."

The district court held "that upon the record in this case the farming exemption ends when the tobacco reaches the receiving platform of the packing house * * * ." 114 F. Supp. 868. We cannot agree. It seems clear to us that a farmer cannot function without a market, that everything done by these farmers was essential for the marketing of their crops, and that the work of their packing house employees, in the preparation for market of the leaf grown exclusively on their farms, constitutes "practices performed by a farmer as an incident to or in conjunction with such

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[5] See Addison v. Holly Hill Fruit Products, Co., Inc., 322 U.S. 607, 614, 615; N.L.R.B. v. John W. Campbell, Inc., 5th Cir., 159 F. 2d 184, 187; Waialua Agricultural Co. v. Maneja, 9th Cir., 216 F. 2d 466, 474, 475.

farming operations, including preparation for market," within the meaning of Section 203(f).[6]

All of the appellants claim that their employees are exempt from the Act by virtue of Section 213(a)(10) (see footnote 3, *supra*), because their operations are one of those enumerated in that section and necessary for the marketing of their crops, and because the Administrator exceeded his authority in excluding from the "area of production", "any city, town or urban place of 2,500 or greater population." Appellee concedes, as it must, that this Circuit has already held that the Administrator did so exceed his authority.[7] Appellee insists, however, that after it reached the packing house, the tobacco was no longer an "agricultural or horticultural commodity", and that the processing operation was not one of those enumerated in the section. The legislative history of Section 213(a)(10) makes clear that its primary purpose was to prevent discrimination against the small farmer.[8] When

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[6] See Farmers Irrigation Co. v. McComb, 337 U.S. 755; Addison v. Holly Hill Fruit Products Co., Inc., 322 U.S. 607; N.L.R.B. v. John W. Campbell, Inc., 5th Cir., 159 F. 2d 184, 187; Waialua Agricultural Co. v. Maneja, 9th Cir., 246 F. 2d 466; American Sumatra Tobacco Corp. v. Tone, (Conn.) 15 Atl. 2nd. 80.

[7] Jenkins v. Durkin, 5th Cir., 208 F. 2d 981; Lovvorn v. Miller, 5th Cir., 215 F. 2d 601. Cf. Tobin v. Traders Compress Co., 10th Cir., 199 F. 2d 8. It seems particularly clear that the Administrator did exceed his authority as to the area of production involved in this particular case.

[8] Mr. Schwellenbach. . . . If we leave the bill the way it now stands, it is going to mean that the large producer on the large ranch who can afford to maintain the equipment on his own ranch is going to have an unfair advantage over the small man who has only 5 or 10 acres, and who has to send his crop to a central warehouse, or who may join with others in a cooperative warehouse, and there have the same processes performed." 81 Cong. Rec. 7659.

"But it seems that, so long as they remain in their natural

it is considered that admittedly the processing was essential for the marketing of the tobacco, again it seems clear to us that the employees of all of the appellant's are exempt under Section 213(a)(10). Since we are of the opinion that the employees are exempt under Section 213(a)(10), we do not feel called upon to discuss the respective fields of operation of the total exemptions in that section and of the partial ex-

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state and all of the work that is done upon them is the ordinary agricultural operation up to the point of processing, whether they are handled on the farm or by a group of men gathered together in a cooperative, or turned over to a central warehouse *they should be exempt, because of the fact that if we do not exempt them we are giving the large producer a very distinct advantage over the small producer, and I am certain it is not the purpose of the bill and is not within the economic theory of the bill to give the large producer an advantage over the small producer.*" (Emphasis supplied.) 81 Cong. Rec. 7669.

Mr. Schwellenbach. "The amendment is very strictly drawn in an effort to limit the operations defined therein purely to those of an agricultural nature * * * In other words, in a small apple operation of 5 or 10 or 15 of 20 acres, it is not possible for the owner of the ranch to purchase and maintain on the ranch the necessary machinery which is required in the washing operation under the rules and regulations of the Department of Agriculture. It is not possible for him to provide on his ranch the necessary storage space to store the apples until such time as it is possible to take them to market. It is not possible on the small ranch to supply the space for packing the apples. Therefore it is necessary for such a farmer either to join other farmers in a cooperative or to send his apples to a packing house, and have these operations which are purely agricultural operations performed elsewhere than at the situs of the ranch or the farm.

The purpose of this amendment is to give protection against that situation, and to make it possible for the small fruit and vegetable producer to operate upon the same basis as the large fruit and vegetable producer." (Emphasis supplied.) 81 Cong. Rec. 7876.

In other words, the small producer cannot afford to have the capital investment in the warehouse, the washing machinery, all of the necessary incidentals to this operation, while

emption in Section 207 (c), further, that is to say, that we agree with the Ninth Circuit that "these exemptions overlap and are not alternative or mutually exclusive." *Weather Farm Bureau Co. v. Maine*, 9th Cir., 155 F. 2d 603, 607.

Appellee insists, however, that Section 2(b)(1)(B) is inoperative until the Administrator makes a valid definition of the area of production. That much can be granted, but in a case like this, otherwise without the exemption, and which might likely fall with a valid definition of the area of production, the appellee is in no position to seek the equitable remedy of injunction until such definition has been made.

The judgments are, therefore, reversed and the causes remanded with directions to enter judgment for the defendants, and for the intervenor, May Company.

Reversed and Remanded, with Directions.

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the larger producer can afford them and he is exempt from the provisions of the bill." 81 Cong. Rec. 7877.

"*The purpose of the amendment is not for the protection of the packing plant or for the protection of the owner of the packing plant. The cost is passed to the producer. These packing plants just pass the cost back to the man who produces the apples. The farmer pays the bill. The purpose of the amendment is to permit the small farmer, who cannot afford to have his own warehouse and cannot afford to have his own washing machine, to be placed upon a parity with the larger producers, who can afford to maintain their own warehouses and their own washing machines and their own equipment.*" (Emphasis supplied.) 81 Cong. Rec. 7877.

See also the dissenting opinion in Addison v. Holly Hill Co., 322 U. S. 607, at p. 633.

See Fleming v. Farmers Peanut Co., 5th Cir., 128 F. 2d 401, cf. Puerto Rican Tobacco Marketing Coop. Ass'n v. McComb, 1st Cir., 181 F. 2d 697.

See Messenger v. Traders Compress Co., D. C., E. D. Okla., 107 F. Supp. 354, 360; Walling v. McCracken County Peach Growers Ass'n, D. C., W. D. Ky., 50 F. Supp. 900, 905, 906.

JUDGMENT

No. 15016.

Extract from the Minutes of April 15, 1955.

JOSEPH T. BUDD, JR., and FLORENCE W. BUDD, co-partners, doing business as J. T. BUDD, JR. AND COMPANY,

versus

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to enter judgment for the defendants.

JUDGMENT

No. 15071.

Extract from the Minutes of April 15, 1955.

KING EDWARD TOBACCO COMPANY OF FLORIDA and MAY TOBACCO COMPANY, Intervenor,

versus

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor.

This cause came on to be heard on the transcript of the record from the United States District Court for

the Northern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to enter judgment for the defendant, and for the intervenor, May Company.

SUPREME COURT OF THE UNITED STATES.
October Term, 1955.

No. —

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

vs.

JOSEPH T. BUDD, JR., ET AL., d.b.a. JOSEPH T. BUDD & COMPANY, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 1, 1955.

HUGO L. BLACK,
Associate Justice of the
Supreme Court of the United States.

Dated this 8th day of July, 1955.

APPENDIX B

Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U.S.C. 201)

SEC. 3. [52 Stat. 1060] As used in this Act—

* * * * * * *

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

* * * * * * *

SEC. 7. [63 Stat. 913]. * * *

* * * * * * *

(c) In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) shall not apply to his employees in any

place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

* * * * * * *

SEC. 13. (a) [63 Stat. 918] * * *

* * * * * * *

(6) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a share-crop basis, and which are used exclusively for supply and storing of water for agricultural purposes;

* * * * * * *

(10) any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products;

* * * * * * *

Text of the Administrator's regulation defining the "area of production."

(29 C.F.R. 536.2) (Federal Register, December 25, 1946, 11 F.R. 14648, 13 F.R. 7347)

"Area of production" as used in section 13(a)(10) of the Fair Labor Standards Act. (a) An individual shall be regarded as employed in the "area of production" within the meaning of section 13(a)(10) of the Fair Labor Standards Act in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(1) If the establishment where he is employed is located in the open country or in a rural community and 95 percent of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the following air line distances from the establishment:

(i) With respect to the ginning of cotton—10 miles;

(ii) With respect to operations on fresh fruits and vegetables—15 miles;

(iii) With respect to the storing of cotton and any operations on commodities not otherwise specified in this subsection—20 miles;

(iv) With respect to the compressing and compress warehousing of cotton, and operations on tobacco, grain, soybeans, poultry or eggs—50 miles.

(b) For the purposes of this section:

(1) "Open country or rural community" shall not include any city, town or urban place of 2,500 or greater population or any area within:

(i) One air line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000 or

(ii) Three air line miles of any city, town or urban place with a population of 50,000 up to but not including 500,000, or

(iii) Five air-line miles of any city with a population of 500,000 or greater,

according to the latest available United States Census.

(2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 95 percent of the commodities are received from normal rural sources of supply shall be the last preceding calendar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except

that dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable.

UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION

New York, New York

In the matter of the redefinition of the "area of production" as used in sections 7(c) and 13(a)(10) of the Fair Labor Standards Act of 1938

Findings of the Administrator December 18, 1946

These findings are primarily intended to provide a statement of the major considerations entering into the promulgation of the regulations redefining "area of production." The redefinition of the "area of production" was undertaken pursuant to the order of the United States Supreme Court in the case of *Addison et al.* v. *Holly Hill Fruit Products, Inc.* (322 U.S. 607). The specific issue before the Court in that case was the validity of the following definition contained in Regulations Part 536 issued by the Wage and Hour Division:

> "An individual shall be regarded as employed in the 'area of production' within the meaning of section 13(a)(10) * * * (1) if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven (29 C.F.R. (1940 Supp.) 536.2)"[1]

The Supreme Court held these regulations to be invalid on the ground that the "area of production"

[1] A later revision of this definition increased the permissible number of employees from seven to ten. 29 C.F.R. (1941 Supp.) 536.2

could not be defined in terms of the number of employees in the plant and remanded the case to the District Court "with instructions to hold it until the Administrator, by making a valid determination of the area with all deliberate speed, acts within the authority given him by Congress." The Court noted the Congressional intent to distinguish between rural communities and the urban centers and indicated in the following language the general principles for drafting a new definition:

> "The textual meaning of 'area of production' is thus reinforced by its context: 'area' calls for delimitation of territory in relation to the complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and more or less near their production. The phrase is the most apt designation of a zone within which economic influences may be deemed to operate and outside of which they lose their force. In view, however, of the variety of agricultural conditions and industries throughout the country the bounds of these areas could not be defined by Congress itself. Neither was it deemed wise to leave such economic determination to the contingencies and inevitable diversities of litigation. And so Congress left the boundary making to the experienced and informed judgment of the Administrator. Thereby Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter, that is the fixing of minimum wages and maximum hours.
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> "In delimiting the area the Administrator may properly weigh and synthesize all such factors."

Studies were initiated immediately after the Court's decision with a view to promulgating a new definition along the lines indicated in the opinion. Numerous conferences were held throughout the country with representatives of labor and of the industries involved. Economic reports dealing with commodities affected were prepared, and a large amount of economic data assembled. More economic material was presented at

the hearings. Six formal hearings were held between December 1944 and March 1945 for the industries concerned with the following commodities: (1) fresh fruits and vegetables; (2) cotton; (3) tobacco; (4) grain; seeds; dry edible beans and dry edible peas; (5) dairy products, poultry and eggs; and (6) miscellaneous agricultural and horticultural commodities not covered by the other hearings. One or more definitions were proposed for discussion at each of these hearings, but the scope of the hearing included consideration of any other proposals that might be presented.

The invalidated definition had avoided most of the economic discriminations inherent in an exemption of this kind by restricting the exemption to small establishments whose effect on the labor market and labor standards is negligible. After the Supreme Court's decision, a great variety of possible criteria which could be used in defining the "area of production" for different agricultural commodities were explored. It was apparent, however, from numerous studies made by the Division that no valid criteria which could be developed would result in as little economic dislocation as had been experienced under the invalidated definition. The best available criteria for delimiting territory in relation to the complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and more or less near their production," and for distinguishing between "rural agricultural" and "urban industrial" conditions in accordance with the intent of Congress were found to be: (1) the distances from which the enterprises obtained the commodities on which they performed the operations named in the statute; and (2) the nature of the community in which they were located, as indicated generally by a population test.

A definition of "area of production" employing such "population mileage" criteria had been in effect for a period of more than a year prior to October 1, 1940. This definition included within the area of production any individual performing the specified operations "on materials all of which come from farms in the immediate locality of the establishment where he is employed and the establishment is located in the

open country or in a rural community." "Immediate locality" was limited to distances of not more than 10 miles, and "open country or rural community" was defined so as to exclude any town or city of 2,500 or greater population according to the last available United States Census. This definition was abandoned in favor of the definition containing an employee limitation when industry representatives protested that it resulted in numerous competitive inequities and economic discriminations between establishments located within the "area of production" as so defined and those outside the "area of production."

Tests based on distance and population were the bases of all but one of the definitions proposed for discussion at the hearings. An alternative proposal for fruits and vegetables substituted for the mileage criterion the requirement that the establishment must be located in a county in which the total of the acreage harvested in all fruits and vegetables is 20 percent or more of the crop land harvested. It was not feasible, however, to develop suitable criteria of this type for other commodities. Such a test, moreover, did not appear to take into account some of the economic factors involved in defining the area of production. For these reasons, and because of other considerations, the definitions proposed for hearings held subsequent to the one for fruits and vegetables did not contain similar proposals. It was finally decided not to use this criterion as a part of the definition, but to take account of the economic factors reflected by such a test in selecting the pertinent milliages for each group of commodities.

The definition of "area of production" proposed in the notices of hearing for the different commodities were drawn with a view to carrying out insofar as possible the following objectives: (1) to distinguish generally between establishments operating under "rural agricultural" conditions and those subject to "urban industrial" conditions; (2) to indicate for each agricultural commodity or group of agricultural commodities the zones which would be deemed to be "more or less near" the production of the particular agricultural commodity. Efforts were also directed toward eliminating insofar as possible within the frame

work of the congressional intent and the economic and legal considerations involved. The most serious criticisms of the previous definition which had employed population and mileage as criteria for exemption:

One of the most frequently urged of the objections to the "40 mile 2,500 population" definition had been that by failing to treat all establishments alike—by denying the exemption to all of them or exempting them all—it placed some establishments at a competitive disadvantage with respect to others. Such discrimination, however, seems to be inherent in the statute itself, which did not exempt all employees in the industries involved, but only those employed "within the area of production." It is apparent that only a definition which would have the effect of exempting all or none of the employees would entirely avoid this discrimination. That such a definition would be invalid is evident from the statement of the Supreme Court in the Holly Hill case that "to hold that all individuals 'engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter, or other dairy products' are exempt from the operation of the Act is obviously to fly in the face of congressional purpose. The Act exempts some but not all of the employees engaged in these industries . . . ." It is obvious therefore that some discrimination, in the sense that some establishments will not meet the test for exemption, must inevitably result from any valid definition.[1]

[1] Although this could not be taken into consideration in formulating the definition, it was apparent from the evidence presented at the hearings that such discrimination had become largely academic in nature. Representatives of industry after industry testified that the minimum wages paid exceed the minimum currently required by the Fair Labor Standards Act and that consequently the industry would not be required to increase wages by reason of failure to qualify for exemption under section 13(a)(10). There was testimony to the effect that the establishments concerned would incur some cost for overtime if they failed to qualify for exemption. However, it was clear that relatively few establishments could take full

The definitions proposed for consideration at the hearings, while adopting population and distance from which commodities are received as basic criteria for exemption, which included modifying factors, were designed to reduce the impact of discriminations that had resulted from the "10-mile, 2,500-population" definition previously in effect. The 2,500 population test was retained in the definitions proposed for discussion at the hearings despite previous objections to it because it came closer to accomplishing the objective for which it is intended than any other known test and because it has been the dividing line between rural and urban communities used for many years by the Bureau of the Census and other agencies of government. One serious objection related to the competitive discriminations which arose in cases where plants located within the city limits of a town of more than 2,500 population were not exempt, while some of their competitors who happened to be located across the boundary line of the same town were exempt. In many instances, it could obviously not be said that the boundary of the town marked the dividing line between establishments operating under rural rather than urban labor conditions. Instead it appeared clearly that the influence of the town on the market for labor, as well as on wage levels and related conditions, extends for some distance into the surrounding area. To minimize the discriminations resulting from this particular type of competitive situation, the definition of the terms "open country" and "rural community" in the proposed definitions included areas surrounding the towns as well as the towns. For purposes of the hearings the size of the surrounding areas

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advantage of the overtime exemption provided in the "area of production" sections of the Act, in view of the unionization which had taken place in the last few years and the fact that most affected industries have 14 weeks, 28 weeks and in some instances year-round exemptions from overtime under other provisions of the Act. Rising wage rates and the spreading practice of paying premium rates of overtime since the hearings have reduced even further the number of establishments that could derive any material benefit from either the minimum wage or overtime exemptions provided for plants in the area of production.

assumed to be within the influence of the urban community and hence excluded from the definitions of rural community or open country ranged from 3 miles to 20 miles, depending upon the population of the town or city.

The objections to 10 miles as a universal distance denoting nearness to source of supply were also recognized in the proposed definitions by (1) varying the allowable distances on the basis of population density for some commodities, permitting greater distances in the more sparsely populated areas and shorter distances in the more thickly populated areas; and (2) increasing permissible distances for most commodities to mileages believed to be more consistent with the drawing radius of plants operating within their own producing areas, while at the same time giving due weight to the many "complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and more or less near their production." Thus, in addition to the other requirements, mileages varying from ten miles for some agricultural commodities under certain conditions to as much as 50 miles for other commodities were proposed for consideration at the hearings.

Another objection to the previous "population-mileage" definition was the requirement that *all* of the commodities received by the exempt establishment had to come from farms within the specified distance from the establishment. As a result of this requirement, it had been pointed out, a farmer located in an area remote from an exempt plant might be deprived of the opportunity of marketing his products, since the exempt establishment would lose its exemption if it handled his crop. The validity of this objection was recognized in the definitions proposed for discussion at the hearings by including a provision permitting 5 percent of the commodities to come from beyond the specified mileages without defeating the exemption.

Alternative proposals submitted at the hearings or in post-hearing briefs by employer organizations were quite generally designed to exempt all or practically all establishments in the particular industry or branch

of the industry represented. In general, the employer proposed definitions did not differentiate between rural agricultural and urban industrial conditions. A number of the proposals, moreover, were of at least doubtful legality when considered in the light of the majority opinion in the Holly Hill case. One type of definition proposed by industry representatives would have had the effect merely of striking the words "area of production" from the Act. Others merely named all the counties in which any appreciable amounts of the commodity is grown. These proposed definitions would have exempted everyone engaged in the named operations with possible exceptions in instances which seem to be extremely rare. Some organizations adopted the general criterion of distances from which commodities are received, but proposed mileages so broad as to include all establishments within the exemption. One novel but hardly practicable proposal was made that the Administrator refrain from defining area of production, leaving the question to be decided by the courts in each individual instance.

Some labor representatives on the other hand proposed definitions which they admitted frankly were designed to deny the exemption to all but a very few establishments. One proposal made by labor representatives adopted the population mileage criterion, but restricted the area from which the establishment could draw its commodities to 5 miles, and included within the exemption only establishments which were in the open country or in rural communities with populations of less than 500, and which had annual sales of less than $20,000. One labor organization proposed that 500 population and 2 miles be the test. Another labor proposal would have required the Administrator to determine in each individual case whether the establishment was in the area of production and would have made the tests for exemption so restrictive that probably no establishment could have qualified.

The objections to the definitions proposed for discussion at the hearings were in general directed to the fact that they would result in discriminations because they did not have the effect of exempting all or a sufficiently large proportion of the establishments in a particular

industry or part of an industry represented at the hearing. Much of the testimony at the hearings was directed to showing that particular establishments or groups of establishments in one or another sections of the country would not qualify for exemption under the proposals contained in the notices of hearing. The reasons why such effects are inevitable under any valid definition have been indicated above, and no valid method of completely eliminating them appears to be possible. To the extent possible within the legal and economic limitations of the problem, the criticisms and suggestions which had merit have been taken into consideration in formulating the final definitions.

That portion of the proposed definitions which defined "open country" or "rural community" in terms of a population of less than 2,500 was also attacked. It was argued by some that the population of a community does not determine whether it is agricultural or industrial in character, and examples were cited of towns of more than 2,500 which were said to be predominantly agricultural in character, and of towns of less than 2,500 which were obviously industrial. However, no better criterion for accomplishing the objective of distinguishing establishments subject to "urban-industrial" conditions from those under the influence of "rural-agricultural" conditions was developed at the hearings. Independent investigation by the staff of the Wage and Hour Division as well as consultation with experts of the Department of Agriculture and other Government bureaus, moreover, failed to develop any administratively feasible substitute for population as a test of urbanization and industrialization. In the course of the investigation and study of this problem, consideration was given to a number of such possible alternatives to the population test as the major source of income of the town (e.g., whether agricultural or industrial) and various types of criteria indicating the extent of industrial employment in relation to employment in the handling and processing of agricultural commodities, but all were found to be impracticable and were abandoned. An analysis of all the available data indicated, however, that while the size of a town is not a perfect criterion of its urban or industrial

character, it is nevertheless the best available test, and leads to results which in general fit reasonably well the warrant for its adoption.

Even those who contested the propriety of using a population test to distinguish plants operating under "rural agricultural" rather than "urban industrial" labor conditions argued, however, that a population of 2,500 was not the proper dividing line. Representatives of industry attacked the figure 2,500 as too small, while labor representatives insisted that it was too large. Examples were given of communities with populations considerably in excess of 2,500, in which, it was contended, labor conditions were not different from those in towns of less than 2,500. Examples were cited of towns of larger population than 2,500 which were said to be predominantly "agricultural" in the sense that they were dependent upon the surrounding agricultural areas for their economic existence and the principal activities were related to the handling or processing of agricultural commodities or of otherwise serving the farmers in the surrounding community. Representatives of employer groups advanced proposals that the population line be drawn at various figures ranging up to 100,000 or more. Some employer representatives suggested that only terminal or market cities be excluded from the area of production. At the other extreme, labor representatives pointed to the widespread industrialization in towns of less than 2,500 and proposed that establishments be considered outside the "area of production" if they were located in communities with populations in excess of 500 persons.

An analysis of the proposals advanced by representatives of employer groups at the hearings as substitutes for the proposed 2,500 population test, indicates that in most instances they were designed to exempt all or practically all of the establishments represented by the particular group making the proposal. While the 2,500 population test was criticized by employer representatives because it excluded some towns of larger population which were said to be agricultural in character, the alternatives proposed by them would have had the equally objectionable effect of including within the area of production an even greater number

of clearly industrial towns. The proposal of labor representatives that the dividing line be drawn at communities with populations of 500 persons would have excluded all of the urban industrial communities from the area of production, but would also have excluded a disproportionate number of truly rural and agricultural communities.

It seems reasonable to conclude from the record and all the available evidence that the tests proposed at the hearings as substitutes for the 2,500 population criterion are subject to at least as many objections as have been levied against the 2,500 population test. Although it is clear that any line attempting to distinguish between "urban industrial" and "rural-agricultural" communities on the basis of population can at best be only an approximation, it is equally clear that none of the proposals advanced at the hearing would accomplish the objectives of such a test with as much accuracy as the 2,500 population test. As a class, places of 2,500 population or more are predominantly industrial; while places with populations of less than 2,500 are predominantly agricultural. A population limit of 2,500, moreover, has for over 35 years been the official dividing line between "rural" and "urban" employed by the Bureau of the Census in its studies. This dividing line has also been accepted and used in studies made by the Bureau of Agricultural Economics, the Federal Emergency Relief Administration, the Works Progress Administration and other government agencies. It has furnished the definition of "rural" communities which has been the basis of studies of rural and urban communities by many sociologists. It has been incorporated into statute by the Congress of the United States in special legislation for rural communities.[1] To a very great extent the handling and processing of agricul-

[1] See, for example, 30 Stat. 356; 40 Stat. 1189, "an act appropriating funds for the construction of rural post roads"; on the other hand the Rural Electrification Act (7 U.S.C.A. Sec. 913) defines "rural area" as "any area of the United States not included within the boundaries of any city, village or borough having a population in excess of fifteen hundred inhabitants."

tural and horticultural commodities is carried on in the open country or in towns of less than 2,500. For example, only about 10% of grain elevators are located in towns of 2,500 or more. Only about 11% of cotton gins are located in such populated places. About two-thirds of all fresh fruit and vegetable canning and packing, cheese manufacturing and poultry and egg assembling are carried on in the open country or in towns of 2,500 or less.

On the basis of all the evidence, it is my conclusion that a population test of 2,500, while not drawing a line between "urban-industrial" and "rural agricultural" conditions with a fine precision, will come as close to accomplishing this objective as it is possible to come in a general rule applicable to many situations.

Objections were also voiced at the hearings against those portions of the proposed definitions which excluded from the area of production establishments located within specified distances of population centers, the distance increasing with the population of the city or town. Under the proposed definitions, establishments were excluded from the "area of production" if they were located within 3 miles of towns with populations between 2,500 and 10,000, 6 miles from towns of 10,000 to 25,000, 10 miles from cities between 25,000 and 100,000 and 20 miles from cities of 100,000 population or more. One purpose of this requirement, it will be recalled, was to meet one of the objections raised to the "10-mile 2,500 population" definition which had previously been in effect; that it frequently discriminated against employers located within the limits of the town while giving a competitive advantage to employers who moved their establishments just beyond the boundary in order to avoid paying municipal taxes or for other reasons. It was apparent, moreover, that the influence of an urban community does not end at the political boundary, but extends for some distance beyond it into the surrounding area.[1] The distance over which this

[1] This has long been recognized by the Bureau of the Census in its demarcation of metropolitan districts to include certain settled areas contiguous to cities. A district of this type, the Bureau found, tends to be a more or less integrated area with

influence extends depends upon a variety of factors, but is related with a fair degree of accuracy to the population of the city. The rationale for such a test appears to have been supported by the facts, which indicated that it would tend to eliminate competitive discriminations of the most serious kind, by excluding from the "area of production" establishments which are subject to "urban industrial" labor conditions although not located within political boundaries of cities or towns. The testimony at the hearings indicated, however, that the distances specified in the proposed definitions were greater than was necessary to accomplish the desired purpose, since they had the effect of disqualifying some establishments which were too far away from the town to be within its influence. Census data on metropolitan districts and other available information, moreover, tended to support this testimony. The evidence indicated that the urban influences tended to extend roughly one mile outside of the limits of cities with populations between 2,500 and 50,000, three miles from cities between 50,000 and 500,000, and five miles from cities of 500,000 or over. The definition of "area of production" which has been adopted therefore excludes establishments located within such distances of cities, towns or urban places with the specified populations. These distances tend to reflect the direct influence of the urban community upon the surrounding area.

The Congressional purpose of restricting the exemption to establishments located "more or less near" the production of the agricultural commodity has been recognized in the definitions of "area of production" adopted since the effective date of the Act. The test of

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common economic, social and often administrative interests. Serious consideration was given to the adoption of surrounding areas of these metropolitan districts in lieu of the bands proposed at the hearings. This was abandoned in favor of specific mileage bands, however, because the areas included within these metropolitan districts reflect the influence of some factors which are not pertinent to the problem of defining "area of production" and also because no data are available with respect to metropolitan districts for cities of less than 50,000 population. See *Census of Population*, 1940

nearness to the farms on which the commodities are grown was made a part of the very first definition of "area of production" issued in October 1938, in the requirement that the establishment must receive its agricultural or horticultural commodities "from farms in the immediate locality." Special definitions for dry edible beans and for Puerto Rican leaf tobacco recognized this principle in the requirement that the exemption apply only to employees at the place where these products were first assembled from nearby farms. A later definition for fresh fruits and vegetables defined the term "immediate locality" more specifically in terms of a distance of 10 miles or less. In 1939, "immediate locality" was broadened to "general vicinity," but no exact definition of the term was included within the regulations defining "area of production." Court decisions holding parts of the definition of "area of production" to be invalid did not upset that portion of the definition which required that all commodities come from "the general vicinity" of the establishment in order that the employees qualify for exemption. The provision of one of the previous definitions restricting the distance to 10 miles and requiring that *all* of the commodities come from within that distance seems to have been approved as valid by the United States Supreme Court in the *Holly Hill* case. Thus the courts appear to have sustained the validity of employing a test that related the proximity of the establishment to the farms producing the commodities it handles.

Nevertheless, the use of a mileage criterion was opposed by some groups at the hearings, particularly those having members who did not operate entirely within one producing area but reached out over great distances to obtain the materials needed to operate their plants. Other groups argued that a mileage criterion could be employed only if it were great enough to include all establishments. For example, the representative of the cotton compressors opposed the use of a mileage criterion, pointing out that many compress operators receive their cotton from very great distances, and taking the position that a cotton compress should be entitled to the exemption even if it received cotton from a foreign country. The representatives of

the tobacco redrying industry also opposed mileage criterion unless the mileage used was a "large figure." The economy disclosed that some redrying plants located in the tobacco growing region of North Carolina receive tobacco for redrying from producing areas in the State of Georgia. Consequently, this group was opposed to any mileage test which would not exempt North Carolina plants reaching into Georgia for their tobacco.

An analysis of the available data indicates quite clearly that the longest hauls of agricultural or horticultural commodities normally occur when the commodity is moved to an establishment which has not been located principally to serve the nearby farms, but for reasons involving nearness to terminal facilities, markets, labor supply or other such considerations. The most striking instances of this kind of establishment are the large cotton compresses located in cities having port facilities which are principally established there for convenience in handling cotton for water transportation and the export trade. Such compresses reach out over hundreds of miles for the cotton handled by them, and, incidentally, generally operate in large cities under urban industrial conditions. Their relationship to the farmer and to agriculture is considerably more remote, for example, than that of the cotton gin, the warehouses, and even the inland compresses. Some establishments in other industries or branches handling agricultural commodities also reach out beyond their immediate producing areas and obtain greater or lesser amounts of the commodity they handle from other producing areas. The number of such establishments varies with the different commodities or industries and may vary in different sections of the country and from time to time.

The distances from which establishments receive their commodities reflect to varying degrees the influence of significant economic factors, many of which are pertinent to the complex task of determining the kinds of establishments that should or should not be exempt from the minimum wage or overtime provisions of the Act. Consequently, one of the major tests adopted for delimiting the zone within which the pertinent eco-

nomic influences may be deemed to operate and outside of which they lose their force, is the distance from which establishments in the various industries receive the commodities upon which they perform the operations specified in sections 7(c) and 13(a)(3)(10) of the Act.

The selection of appropriate distances for the different commodities and groups of commodities has been no easy task, and was accomplished only after carefully weighing and synthesizing a large variety of complicated economic factors. Among the many factors taken into consideration were the following: the kind of crop; the distances from which the establishments in each industry receive the agricultural or horticultural commodities upon which they perform the operations specified in the pertinent sections of the Act; the geography and topography of the various sections of the country in which the different commodities are normally produced; the location of the plants within these areas; the concentration of cultivation of the different commodities in various sections of the country; the pattern of concentration of agricultural production with respect to the location of the establishment; differences in practice as between single crop areas and diversified farming areas; the perishability of the commodities received; the extent to which the plants deal with a single commodity rather than a variety of commodities; the nature of the operations performed on the commodities received, including the degree of industrialization of the various operations; the number of hands or operations through which the particular commodity has moved since leaving the farm, including the possibility of passing increased labor costs back to the farmer; the marketing practices of the particular industries; and the wage rates paid, and overtime practices, in the various communities concerned with particular commodities.

On the basis of all the evidence, it is my conclusion that the operating distances which may be considered "more or less near" the establishment with respect to particular industries or commodities and which (to the extent that this can be accomplished by a distance test)

most nearly delimit the zones within which the pertinent economic influences operate, are as follows:

(a) the ginning of cotton—10 miles;
(b) all operations on fresh fruits and vegetables—15 miles;
(c) the storing of cotton and any operations on commodities not otherwise specified—20 miles;
(d) the compressing and compress warehousing of cotton and operations on tobacco (except Puerto Rican leaf tobacco[1]) grain, soybeans, poultry or eggs—50 miles.

In arriving at these distances the weighing of the many factors had to be accomplished with the best data available for the particular industries. Some grouping and averaging was necessary, moreover, since it was not feasible to develop one or more separate distance requirements for each of approximately 300 affected commodities. It is my considered opinion, nevertheless, that the distances specified in the definitions will in general accomplish the required objectives.

Complicating the task of determining the appropriate distances from the establishments to the farms on which the commodities were produced was the fact that some of the operations specified in the statute are two or more stages removed from the farm. At each successive stage it is increasingly difficult to identify the farms on which the commodities had their origin. At each successive stage, moreover, the commodities may be expected to be further removed from the farms on which they were grown. Some allowance was made for these factors in selecting the particular distances applicable to each commodity or group of commodities. It was also found necessary, however, to develop some method of making reasonably sure that commodities which are received from other handlers or processors rather than directly from farms

[1] The definition of the "area of production" of Puerto Rican leaf tobacco involves a number of very complex special problems, which make it desirable to consider that commodity separately. Consequently, the previous definition will be left in effect until such time as a separate hearing can be held with respect to it.

were produced on farms more or less near the establishment. This might be approximated by a requirement that the establishment from which the commodities came must also be operating within the "area of production" as defined. It was not considered practicable to establish such a requirement in view of the difficulty of ascertaining the facts regarding the operations of the supplying establishment. Available evidence indicated, however, that the supplying establishments which were located in the open country or in rural communities were more likely to receive the commodities from nearby farms than establishments not so located. The "distance" test was therefore drafted in terms of receipts from "normal rural sources of supply" which have been defined to include certain other establishments as well as farms. Thus, the receipt of commodities in accordance with this test may be established by showing that the commodities were received from any of the following sources within the specified distances: (1) farms; (2) farm assemblers or other customary supplying establishments (a) located in the open country or in a rural community, or (b) not located in the open country or in a rural community, provided it is shown that the commodities actually originated on farms within the specified distances from the establishment claiming the exemption.

A tolerance of 5% has been included in the definition in order to allow the exemption to apply despite receipt of an occasional shipment from a remote farmer or from an urban source, or a source which cannot for one reason or another be determined. This tolerance applies to the total combined receipts for the period specified. An establishment may therefore qualify even if the receipts of one or more commodities from disqualifying sources or distances exceed 5%, provided that the total receipts from disqualifying sources or distances do not exceed 5% of the total receipts of all commodities.

The period for determining whether 95% of agricultural or horticultural commodities are received from normal rural sources of supply within the specified distances will ordinarily be the last preceding calendar month of operation in which the establishment has operated for at least two workweeks. In the case of

establishments performing the specified operations on the particular commodities for the first time, the period will be the total time during which the establishment has so operated, until the required calendar months of operations has elapsed. The preceding calendar month is considered to be the most practicable period for applying the test. It provides a more stable basis for the test than a weekly period, yet will reflect the nature of current operations with much greater accuracy than would the preceding calendar year, which was the period contained in the definitions proposed for the hearings.

On the basis of the considerations discussed above, it is my conclusion that the definitions of "area of production" which will best carry out the objectives of Congress as indicated in the legislative history of sections 7(c) and 13(a)(10) of the Fair Labor Standards Act, and which, to use the language of the Supreme Court, will accomplish the appropriate "delimitation of territory in relation to the complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and more or less near their production," are as follows:[1]

"Area of Production" as used in Section 7(c) of the Fair Labor Standards Act.

(a) An employer shall be regarded as engaged in the first processing of any agricultural or horticultural commodity during seasonal operations within the "area of production" within the meaning of Section 7(c) if he is so engaged in an establishment which is located in the open country or in a rural community and in which such first processing is performed on commodities 95% of which come from normal rural sources of supply located not more than the following air line distances from the establishment:

(1) with respect to grain, soybeans, eggs, or tobacco (other than Puerto Rican leaf tobacco), 50 miles;

(2) with respect to any other agricultural or horti-

[1] The special definition for Puerto Rican leaf tobacco is not set out here, since no change has been made. See note page 12 supra.

cultural commodities—20 miles.

(b) For the purposes of this regulation:

(1) "Open country or rural community" shall not include any city, town or urban place of 2,500 or greater population or any area within

(i) six air line miles of any city, town, or urban place with a population of 2,500 up to but not including 50,000 or

(ii) three air line miles of any city, town, or urban place with a population of 50,000 up to but not including 500,000 or

(iii) six air line miles of any city with a population of 500,000 or greater,

according to the latest available United States Census.

(2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 95% of the agricultural or horticultural commodities are received from normal rural sources of supply shall be the last preceding calendar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable.

"Area of Production" as used in section 13(a)(10) of the Fair Labor Standards Act

(a) An individual shall be regarded as employed in the "area of production" within the meaning of Section 13(a)(10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(1) if the establishment where he is employed is located in the open country or in a rural community and 95 percent of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the following air line distances from the establishment:

(i) with respect to the ginning of cotton—10 miles;

(ii) with respect to operations on fresh fruits and vegetables—15 miles;

(iii) with respect to the storing of cotton and any operations on commodities not otherwise specified in this subsection—20 miles;

(iv) with respect to the compressing and compress-warehousing of cotton, and operations on tobacco (other than Puerto Rican leaf tobacco), grain, soybeans, poultry or eggs—50 miles.

(b) For the purposes of this regulation:

(1) "Open country or rural community" shall not include any city, town, or urban place of 2,500 or greater population or any area within

one air line mile of any city, town, or urban place with a population of 2,500 up to but not including 10,000, or

three air line miles of any city, town or urban place with a population of 50,000 up to but not including 500,000, or

five air line miles of any city with a population of 500,000 or greater.

according to the latest available United States Census.

(2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from farms within such specified distances or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 95 percent of the commodities are received from normal rural sources of supply shall be the last preceding calendar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable.

In concluding this explanation of the considerations entering into the definition of the area of production, I want to make it clear that I am far from satisfied with the definition since employers engaged in the same activities and employees engaged in the same type of work will have unequal rights and obligations under the Act. Such results are unfortunately unavoidable since they arise from the language and theory of this section of the statute itself. In drafting the section of the Act dealing with "area of production" Congress did not define the exact scope of the exemption and delegated the task of defining it to the Administrator.

"It is clear that Congress intended to exempt only those establishments performing the specified operations within the area of production, while leaving within the scope of the minimum wage and overtime provisions of the Act those establishments performing the same operations outside of the area of production, and consequently that some economic discrimination as between establishments within the exemption and those outside of it was also within the intent of Congress. I am frank to say that this economic discrimination leading only to competitive inequalities is not only administratively very difficult but basically unfair and seems to me unsound public policy. Since the previous definition which to a considerable degree minimized these inequalities has been held invalid it is obvious that the only satisfactory solution is a legislative revision of sections 7(c) and 13(a)(10) of the Act. I have elsewhere indicated my views on this and I hope the Congress will take quick action. In the meantime I can only do my immediate duty in carrying out conscientiously to the best of my ability the mandate laid upon me by the Congress."

(S.) L. Metcalf Walling
Administrator.

December 18, 1946